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No. 91-381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. THE OFFICE OF PUBLIC COUNSEL,

Petitioner,

v.

THE ILLINOIS COMMERCE COMMISSION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Illinois Supreme Court

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BRIEF OF RESPONDENTS INTERSTATE POWER COMPANY AND CENTRAL ILLINOIS LIGHT COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CLEMENT F. SPRINGER, JR.
Counsel of Record
EDWARD J. GRIFFIN
WILLIAM D. CARSTEDT
DEFREES & FISKE
200 S. Michigan Avenue
Suite 1100
Chicago, Illinois 60604
(312) 372-4000

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QUESTION PRESENTED FOR REVIEW

Petitioner misstates the holding which the Illinois Supreme Court did make: "that fundamental principles of Federal preemption, as reflected in the longstanding and consistent application of the filed rate doctrine, prohibit the ICC from conducting prudence reviews of FERC-mandated take-or-pay costs" and that "Illinois distributors must be allowed to pass through to their customers the full amount of these charges."[1] The Illinois Supreme Court thus held the Illinois Commerce Commission to be preempted from disallowing local distribution companies ("distributors") recovery of those costs. Furthermore, the Federal Energy Regulatory Commission ("FERC") was determined not to be empowered by the Natural Gas Act to implement FERC's intent to permit states to disallow portions of such costs.

Accordingly, the issue is whether the Supremacy Clause of the U.S. Constitution precludes the States from disallowing recovery in retail rates of local distribution companies of direct-billed take-or-pay costs included in FERC-approved wholesale rates.

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[1]*General Motors Corp. v. Illinois Commerce Comm'n.*, 143 Ill.2d 407, 424, 574 N.E.2d 650, 659 (1991) (Pet. p. A32).

LIST OF ALL PARTIES TO THE PROCEEDING

The People of the State of Illinois *ex rel.*
The Office of Public Counsel
General Motors Corporation
Quantum Chemicals Company, USI Division
USX Corporation
Modern Drop Forge Company
Acme Steel Company
Viskase Corporation
Thomas Steel Company
LTV Steel Company
Alumax Mill Products, Inc.
Wagner Castings Company
Archer Daniels Midland Company
PPG Industries, Inc.
Owens-Illinois, Inc.
A. O. Smith Corporation
General Tire Company
Illinois Commerce Commission
Peoples Gas, Light & Coke Company
North Shore Gas Company
Illinois Power Company
Central Illinois Light Company
Union Electric Company
Interstate Power Company
Northern Illinois Gas Company
Iowa-Illinois Gas & Electric Company
Central Illinois Public Service Company
United Cities Gas Company
Mt. Carmel Public Utility Company
Monarch Gas Company
Tennessee Gas Pipeline Company
Midwestern Gas Transmission Company

Phoenix Chemical Company
Neil F. Hartigan, Attorney General of the
State of Illinois on behalf of The
People of the State of Illinois
Richard Daley, Cook County State's Attorney
Wisconsin Power & Light Company
Citizens Utility Board

Interstate Power Company has no parent or subsidiary company to be listed.

Central Illinois Light Company is a subsidiary of its parent, CILCORP Inc.; Central Illinois Light Company has no subsidiary company to be listed.

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STATEMENT OF JURISDICTION

Contrary to the misstatement of petitioner that "[t]he decision of the Illinois Supreme Court creates serious conflicts with United States Supreme Court case law and the Natural Gas Act" (Pet. p. 2), the decision of the Illinois Supreme Court is wholly consistent with, and predicated upon, the Natural Gas Act and the decisions of this Court confirming Congress' intent as expressed in the Natural Gas Act to "occupy the field" in regulating interstate gas service and rates, and the decisions of this Court pronouncing the rule of federal preemption, mandated by the Su-

premacy Clause of the United States Constitution (U.S. Const., art. VI, cl. 2), known as the filed rate doctrine. Moreover, the decision of the Illinois Supreme Court leads to the conclusion that, even if the filed rate doctrine permitted State disallowance of interstate gas rates, "unless clairvoyance has become an element of prudence, there simply is no basis on which the ICC could conduct a meaningful prudence review,"[2] thus evidencing an independent state law basis for the Illinois Supreme Court's decision.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Supremacy Clause of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2.

The Natural Gas Act, section 1(b):

> (b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

15 U.S.C., Sec. 717(b).

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[2] *General Motors Corp. v. Illinois Commerce Comm'n.*, 143 Ill.2d 407, 424, 574 N.E.2d 650, 659 (1991) (Pet. p. A32).

STATEMENT OF THE CASE

Respondents Interstate Power Company and Central Illinois Light Company submit the following comments deemed most necessary to correct inaccuracies and omissions in petitioner's Statement Of The Case:

Petitioner's reference to "the Sixth Amendment" (Pet. pp. 2-3) presumably should be to the Supremacy Clause of the United States Constitution, U.S. Const., art. VI, cl. 2.

The Illinois Supreme Court held the Illinois Commerce Commission to be preempted from disallowing recovery by local distribution companies of FERC-mandated take-or-pay costs, but did not preclude the Illinois Commission from allocating recovery of such costs among distributors' state-jurisdictional customers.

The take-or-pay costs at issue are costs which interstate pipeline companies, each operating in more than a single state, paid pursuant to contracts between them and their suppliers, and which were imposed upon distributors by FERC as part of interstate natural gas pipeline rates.

The arguments set forth in petitioner's Statement Of The Case at pages 9-10 and 14-16 as to the Illinois Supreme Court's decision are responded to in the following Argument In Opposition.

SUMMARY OF ARGUMENT

Congress' intent to occupy the entire field of wholesale interstate sale of natural gas is clear. FERC's contrary intent is irrelevant in view of the clear intent of Congress. All costs at issue are subject to the exclusive federal jurisdiction of FERC over the interstate sale of wholesale gas, and the "Hinshaw pipeline" exception[3] is inapplicable to those costs. The filed rate doctrine, as

[3]Natural Gas Act section 1(c) (15 U.S.C.; Sec. 717[c]).

applied by this Court in *Nantahala*[4] and *Mississippi Power,*[5] preempts Illinois from "trapping", or disallowing recovery of costs which local distribution companies are mandated to pay under FERC orders allocating take-or-pay costs. Accordingly, the decision of the Illinois Supreme Court is wholly consistent with decisions of this Court, and no reason exists to grant review.

ARGUMENT

Interstate Power Company and Central Illinois Light Company, respondents, submit the following arguments in opposition to the petition for writ of certiorari submitted on behalf of petitioner, The People of the State of Illinois *ex rel.* The Office of Public Counsel. These respondents will demonstrate that misstatements of law and fact as to the jurisdiction of the Federal Energy Regulatory Commission ("FERC") over take-or-pay costs incurred by interstate pipeline companies, upon which petitioner bases its further arguments, have resulted in petitioner's misstatement of the issue determined by the Illinois Supreme Court, and consequently of the questions presented for review before this Court.

Petitioner concedes the "three circumstances" under which federal law preempts state law (Pet. p. 19). In doing so, petitioner specifically concedes that preemption occurs when *Congress* indicates an intention to occupy the entire field of regulation of a particular subject matter (Pet. p. 19), and acknowledges that "the first step in any preemption analysis is whether or not *Congress* expresses an intent to fully occupy a particular area of regulation" (Pet. p. 29). That first step may also be the last step, because "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural*

[4]*Nantahala Power & Light Co. v. Thornburg,* 476 U.S. 953, 90 L.Ed.2d 943, 106 S.Ct. 2349 (1986).

[5]*Mississippi Power & Light Co. v. Mississippi ex rel. Moore,* 487 U.S. 354, 101 L.Ed.2d 322, 108 S.Ct. 2428 (1988).

Resources Defense Counsel, 467 U.S. 837, 842-43, 81 L.Ed.2d 694, 104 S.Ct. 2778 (1984).

Petitioner mistakenly argues that because Congress intended that states continue to regulate *intrastate* gas service (Pet. pp. 20-21), the Illinois Supreme Court's conclusion that "Congress intended Federal law to occupy the field of regulating *interstate* sale of wholesale gas . . ." conflicts with the Natural Gas Act and this Court's decisions in *Nantahala Power & Light Co. v. Thornburg,* 476 U.S. 953, 90 L.Ed.2d 943, 106 S.Ct. 2349 (1986) ("*Nantahala*"), and *Mississippi Power & Light Co. v. Mississippi ex rel. Moore,* 487 U.S. 354, 101 L.Ed.2d 322, 108 S.Ct. 2428 (1988) ("*Mississippi Power*") (Pet. pp. 17-18) (emphasis supplied).

In so arguing, petitioner asserts that, in enacting the Natural Gas Act, Congress had no purpose or effect to cut down state power, citing as authority *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana,* 332 U.S. 507, 92 L.Ed. 128, 68 S.Ct. 190 (1947) ("*Panhandle-Indiana*"), and invoking *California Coastal Comm'n. v. Granite Rock Co.,* 480 U.S. 572, 94 L.Ed.2d 577, 107 S.Ct. 1419 (1987). Petitioner contends that states therefore have some reserved authority to "review" FERC's allocation of take-or-pay charges included in interstate wholesale rates. Petitioner's contention has been addressed recently in *Public Utilities Comm'n. of the State of Cal. v. FERC,* 900 F.2d 269 (D.C. Cir. 1990), where the non-FERC jurisdictional "pre-existing state power" addressed in *Panhandle-Indiana* was distinguished from the lack of state power over the regulation of the interstate transportation of gas and wholesale interstate sales:

> First we must correct California's assumption that FERC's and its jurisdiction are concurrent, an assumption that leads it to invoke *California Coastal Comm'n. v. Granite Rock Co.,* 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987), for the idea that it may control the transportation so long as its regulations reasonably accommodate federal con-

> cerns. But in *Granite Rock* the Court had found that no federal statute was intended to preempt all state environmental regulation. *Id.* at 588, 107 S.Ct. at 1429. Here, if there be Commission jurisdiction over some component of the transaction, it is exclusive over that component.

900 F.2d at 274.

This Court has held in numerous cases that, in adopting the Natural Gas Act, Congress clearly expressed its intent to totally preempt the regulation of wholesale gas rates in interstate commerce. In *Illinois Natural Gas Co. v. Central Illinois Public Service Co.,* 314 U.S. 498, 506, 86 L.Ed. 371, 62 S.Ct. 384, 387 (1942), this Court in a footnote quoted from H.R. No. 709, *Committee on Interstate and Foreign Commerce,* 75th Cong., 1st Sess., April 28, 1937, with respect to the bill which became the Natural Gas Act:

> It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (Citation omitted.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional acts, not subject to State regulation. (Citation omitted.) *The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act.*

(Emphasis added).

In *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 649, 88 L.Ed. 333, 64 S.Ct. 281, 291 (1944), this Court pointed out that "the purpose of the Natural Gas Act was to provide 'through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which the Court had declared to be interstate commerce not subject to certain types of state regulation.' As stated in the House Report, the 'basic purpose' of the legislation was 'to occupy' the field. . . . " See also *Schneidewind v. ANR Pipe Line Co.*, 485 U.S. 293, 99 L.Ed.2d 316, 108 S.Ct. 1145 (1988), and *Michigan Consolidated Gas v. Panhandle Eastern Pipeline*, 887 F.2d 1295 (6th Cir. 1989).

Accordingly, the dual federal-state system of regulation referred to by petitioner is *not* a system which permits co-extensive regulation over single components of a transaction. FERC's jurisdiction over wholesale interstate sale of natural gas is exclusive. States, in the exercise of their jurisdiction over the local distribution of natural gas, have no power over FERC-determined rates for the interstate wholesale of natural gas. Thus, as the Illinois Supreme Court has determined, it is impermissible for states to trap FERC-mandated charges by disallowing recovery of those charges in distributors' retail rates.

Far from conflicting with this Court's decisions in *Nantahala* and *Mississippi Power*, the decision of the Illinois Supreme Court is consistent with and compelled by this Court's holdings in *Nantahala* ("[F]or a state ratemaking agency to disregard a FERC-filed rate would be clearly inconsistent with the federal regulatory scheme over interstate wholesale power prices"[6]) and as quoted with approval in *Mississippi Power* ("[W]hen FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to

[6]476 U.S. at 969, 90 L.Ed.2d at 956, 106 S.Ct. at 2358.

prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. . . . such a 'trapping' of costs is prohibited."[7])

Petitioner refers to and quotes extensively from Natural Gas Act section 1(c) (15 U.S.C., Sec. 717[c]), which created the "Hinshaw pipeline" exception for a company transporting gas in interstate commerce but operating exclusively in one state ("The provisions of this chapter shall not apply to any person engaged in . . . the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received . . . within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State"). That exception is not applicable here, for all take-or-pay costs at issue are included in wholesale rates of companies operating in and transporting gas in interstate commerce between more than one state. Any implication that any of the take-or-pay costs at issue here arose from transportation or sale other than in more than one state, by petitioner's reference to Natural Gas Act section 1(c), is mistaken.

Petitioner mistakenly asserts that distributors had argued that FERC's desire and intent that state commissions have the ability to compel prudence reviews and "equitable sharing" of FERC-approved take-or-pay costs was unclear, and that the Illinois Supreme Court "inappropriately accepted those arguments" (Pet. pp. 34-35). In fact, FERC's intent that states could disallow recovery by local distributors of a portion of the take-or-pay costs direct-billed to them by their pipeline suppliers was expressly acknowledged by distributors with reference to Order 500-H, and recognized by the Illinois Supreme Court.[8] Distributors and the Illinois Supreme Court did not dispute FERC's intent, they properly concluded "that FERC's intent is irrelevant to the applica-

[7]487 U.S. at 372, 101 L.Ed.2d at 338-39, 108 S.Ct. at 2438.

[8]*General Motors Corp. v. Illinois Commerce Comm'n.*, 143 Ill.2d 407, 418-19, 574 N.E.2d 650, 656-57 (1991) (Pet. p. A19-20).

tion of the filed rate doctrine in the context of retail ratemaking"[9] in view of the "clear and controlling" intent of Congress:

> States may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates. *Mississippi Power,* 887 U.S. at 372, 101 L.Ed.2d at 338, 108 S.Ct. at 2439. *See also Nantahala,* 476 U.S. at 970, 90 L.Ed.2d at 956, 106 S.Ct. at 2358-59; *City of Chicago,* 113 Ill.2d at 616.[10]

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[9]*General Motors Corp. v. Illinois Commerce Comm'n.*, 143 Ill.2d 407, 419, 574 N.E.2d 650, 656 (1991) (Pet. p. A21).

[10]*General Motors Corp. v. Illinois Commerce Comm'n.*, 143 Ill.2d 407, 421, 574 N.E.2d 650, 657-58 (1991) (Pet. p. A26).

CONCLUSION

Because the intent of Congress to occupy the field of regulating the interstate sale of natural gas at wholesale is clear, because the intent of FERC is irrelevant in the face of that clear intent of Congress, because the "Hinshaw pipeline" exception to the Natural Gas Act is inapplicable, and because the decision of the Illinois Supreme Court is accordingly consistent with and compelled by the Natural Gas Act and the decisions of this Court in *Nantahala* and *Mississippi Power* in holding the filed rate doctrine to preclude the disallowance of FERC-approved take-or-pay costs, the petition for writ of certiorari should be denied.

Respectfully submitted,

CLEMENT F. SPRINGER, JR.
Counsel of Record
EDWARD J. GRIFFIN
WILLIAM D. CARSTEDT
DEFREES & FISKE
200 S. Michigan Avenue
Suite 1100
Chicago, Illinois 60604
(312) 372-4000
Attorneys for Interstate
Power Company and
Central Illinois Light
Company

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